United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

No. 24,714

374A

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES, Plaintiff-Appellee

v.

JIMMY R. JOHNSON Defendant-Appellant

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANT

OF COUNSEL:

Howard J. Feldman, Esq.
Mark Bayer
Joseph Fowler

WILLIAM W. BECKER
(Appointed by this Court)
Federal Bar Bldg., West
Suite 950
Washington, D. C. 20006

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AUTHORITIES CITED

Cases:

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STATEMENT OF ISSUES PRESENTED

I. Whether a case should be remanded for dismissal or remanded for disposition of a Motion for New Trial where the motion was filed within five days of judgment under Rule 33, and was premised upon a recantation of testimony by a principal prosecution witness, and where the District Judge has failed to act upon the motion while the defendant is incarcerated for five months pending sentencing and then appeal of this case.

II. Whether the verdict of the jury in a "paper-thin" case should be reversed where the Government's case is premised on a one-man identification, where the defendant presented in defense seven unrelated alibi witnesses, who offered testimony contradicting the Government's sole eye-witness, and where the prosecuting attorney asked several improper questions and made several improper statements including an unfounded implication that a principal defense witness was involved in the crime with which defendant was charged.

INSTANCE WHEN CASE PREVIOUSLY BEFORE COURT

In accordance with Rule 8(d) of the General Rules of this Court appellant states that this case has been before the Court as No. 24, 435 on Appellant's Motion for Release on Bail Bond Pending Sentencing but has not been before the Court on the merits. This Court has jurisdiction under 28 U.S.C. 1291.

REFERENCES TO RULINGS

Reference is made to the following rulings of the United States District Court for the District of Columbia, Criminal No. 1866-69: June 11, 1970, Tr.* 118-123; June 12, 1970, Tr. 131-142, 169-170; June 13, 1970, Tr. 249-255, 261-262, 375; June 16, 1970, Tr. 410-413, 463-465; June 17, 1970, Tr. 489; Transcript of June 26, 1970, Hearing 11-15. Additionally, appellant refers this Court to the judgment and commitment entered in that above-numbered case on September 3, 1970.

* References designated "Tr." refers to the Transcript of Testimony in Criminal Case No. 1866-69, June 11, 12, 15, 16, 17, 1970.

STATEMENT OF THE CASE

This case, No. 24,714, is before this Court on the appeal of Jimmy R. Johnson from the judgment of the United States District Court for the District of Columbia (D. J. Aubrey E. Robinson, Jr.) in Criminal Case No. 1866-69, entered against appellant on June 17, 1970. Appellant was found guilty of violating Title 22, D. C. Code Sections 2901 and 502 (Robbery, Assault with Dangerous Weapon), and was incarcerated on June 17, 1970, pending sentencing.

On June 24, 1970, appellant's trial counsel filed a Motion for New Trial, based on newly discovered evidence. No action has been taken by the District Judge to date on that motion.

On June 19, 1970, appellant filed a Motion for Release on Bail Bond Pending Sentencing. Said Motion was heard on June 26, 1970, and denied. On July 10, 1970 appellant filed a Notice of Appeal from the denial of the motion for release. Appellant's Motion for Release on Bail Bond Pending Sentencing was filed with this Court as No. 24435 on July 10, 1970 and was denied without prejudice to renew by Circuit Judges Wright, Robinson and Robb (C. J. Wright not participating) by an Order filed August 14, 1970. Appellant's Motion for Release was thereafter resubmitted in the District Court but was not acted upon.

On September 3, 1970, appellant was sentenced to concurrent terms of 18 months to five years and 1 year to 3 years for the Robbery and Assault with a Dangerous Weapon convictions.

Upon application filed by appointed counsel, on November 25, 1970, appellant was released, pending appeal, on his personal recognizance by the District Judge.

STATEMENT OF FACTS

According to the testimony of Assistant Manager Harry S. Rideout, McDonald's Restaurant, located at 4801 Deane Avenue, Northeast, Washington, D. C. was robbed of $1, 300 by two men in the early morning hours of August 21, 1969 (Tr. 156, 177). According to his testimony the two men, aided by an accomplice, forced his car to a stop after he had closed the store for the night and was travelling home. The two men forced him into the back seat of the car, returned with him to the store, forced him to open the back door, forced him to open up the safe from which they removed the money, locked him in a basement freezer and fled. The accomplice participated only in stopping the car (Tr. 152-157). The appellant was convicted of robbery and assault with a dangerous weapon on the sole testimony of the Assistant Manager as being one of the two men and despite the fact that the appellant introduced testimony of seven alibi witnesses including a police officer.

On Wednesday, August 20, 1969 this McDonald's closed at 12 midnight (Tr. 148). Between midnight and 1:00 a. m. in the early morning of Thursday, August 21, 1969, Rideout supervised cleanup procedures and counted the day's receipts which he subsequently placed in a locked safe located at the rear of the store. Normally there is a security man on duty during the entire night shift (4:00 to 12 midnight) who also stays on until the Assistant Manager closes and leaves the store (Tr. 180, 185). On this particular night the security man left early (Tr. 185). Rideout left the night lights in the store on (Tr. 188) including two sectional fluorescent bulbs lighting the back section of the store (Tr. 189). Rideout could not recall if the lights were left on in the parking lot on that particular night

although side lights were left on (Tr. 190). And, three large light bulbs directly over the back door illuminated the area around that door (Tr. 191). He locked the door and left the restaurant around 1:30 a. m. (Tr. 149).

Richard Brown who had been employed by the Citywide Detective Agency which provided security for this McDonald's testified that as of the last time he assisted in closing in April the McDonald's Assistant Manager would take the nights receipts to the bank with the security guard while on other occasions he would leave them in the safe; that only the McDonald's Manager had the combination of the safe and that the Assistant Manager had the key to only one of the two locks on the back door. (Tr. 437-438).

Rideout got into his car, left the McDonald's lot and proceeded down Minnesota Avenue to Deane Avenue, crossed Deane Avenue and headed west. As he approached the intersection of Oklahoma and Benning Roads, he was overtaken by a car and forced to stop (Tr. 149-150). Two of the three men in that car jumped out, armed with rifles, and told him to get into the back seat of his car. One of the men got behind the steering wheel of his car and the other, allegedly the appellant, placed himself in the passenger seat (Tr. 151-152). Neither of these two men wore disguises or coverings (Tr. 152). Rideout's car made a left turn on to Oklahoma Avenue and paused for a while next to an Esso station. The other car came toward Rideout's car and the third man came out of the car but was waived back by one of the two men. (Tr. 153) Rideout's car returned to McDonald's along the same route that Rideout had taken (Tr. 154). The return to McDonald's took approximately five to seven minutes (Tr. 206). During the ride back the man in the

passenger seat kept a rifle trained on Rideout (Tr. 221). Nothing was said on the return trip (Tr. 154). Rideout testified that he did not recognize the man in the passenger's seat during that trip (Tr. 207).

The two men ordered Rideout to open the door. Rideout testified that despite the bright lights at the door he did not recognize the taller man (Tr. 208). Thereupon the two men and Rideout entered the store and Rideout was ordered to open the safe. After he opened the safe he was told to get down on the floor (Tr. 154-155). The two men removed the money from the safe (Tr. 156). Rideout was asked if there were keys for any place where he could be locked up and he volunteered that he could be locked in the freezer downstairs (Tr. 156). There are fluorescent ceiling lights downstairs outside the freezer which are not as bright as the ones upstairs. Rideout was locked in the freezer. The time spanning from the entrance to McDonald's and the point at which Rideout was locked up was approximately five to ten minutes (Tr. 206). Rideout testified at the trial that the taller of the two men gave all oral instructions (Tr. 213-214) but testified at the grand jury that the taller of the two men didn't do anything but hold the rifle during this period of time (Tr. 213). Because of a safety latch Rideout could get out of the freezer from the inside which he did 10 to 15 minutes after being locked in (Tr. 157-158).

When he returned upstairs he saw a policeman knocking at the back door and let him and several others in (Tr. 158-159). He then proceeded to report to the investigating officers that one of the men was short, five foot four to five foot five and weighed 140 pounds. He was stockily built, had a light complexion and had his hair cut short. The other man, allegedly the appellant, was described as follows

by Rideout to the investigating officer: tall, dark complexioned, black cap, sun glasses, khaki pants and jacket, some hair on his face, weighing approximately 150 pounds and standing about five foot eleven to six feet tall (Tr. 159, 210-211). After arrest, the appellant was weighed and measured by police authorities. His height was 75 1/2 inches (6 feet 3 1/2 inches) and his weight, 207 pounds (Tr. 244). Rideout is five feet eleven inches tall and weighs 212 pounds (Tr. 209).

Rideout testified that during the robbery he realized that he had seen one of the men before, the taller man, purchasing sandwiches at this McDonald's restaurant (Tr. 159-160).

Officer Jack Klepfel, assigned to the Metropolitan Police Department Robbery Squad, Criminal Investigation Division, received a radio call and responded to the robbery and interviewed Rideout (Tr. 220). He was preceded by two uniformed officers from the 14th Precinct, (Tr. 241) one of whom was Officer Emmert. Officer Klepfel testified, from his handwritten notes (Tr. 240), that Rideout gave the following description of the taller suspect (Tr. 222): "Negro male, 25 years old, five foot eleven to six feet, weighed 150 pounds, slender build, medium dark complexion, clean shaven, wearing a black cap and dark blue windbreaker jacket, zipper type, dark khaki trousers, dark rimmed sun glasses, armed with a carbine". Officer Klepfel's typewritten report was identical except that it described the sun glasses as "black rimmed sun glasses with light blue lenses". (Tr. 240) Officer Emmert's report tendered by counsel for the appellant was not permitted to be entered into evidence because Officer Emmert was on two weeks' vacation (Tr. 241, 243.)

Officer Klepfel stated that Rideout told him that the tall suspect had been in the McDonald's shop on numerous occasions to purchase sandwiches and that he could identify him if he saw him again (Tr. 222).

Rideout was shown photographs on the same day of the robbery and was unable to identify anyone from these photographs. A picture of the appellant was not included in this group of photographs (Tr. 223).

Rideout testified that ten or twelve days after the robbery (actually on September 9, 1969 (Tr. 226)) while working the day shift at McDonald's he saw the appellant at around 2:30 p. m. (Tr. 161-164). Despite the fact that the appellant looked directly at Rideout (Tr. 163) the appellant entered the store, made a purchase and left. Rideout, believing the appellant to be the taller of the two robbers of August 21, 1969, wrote down the appellant's license number and called the police (Tr. 164).

On September 11, 1969, Detective Klepfel visited Rideout and showed him ten photographs. Rideout picked the appellant's picture out of these photographs as the tall robber (Tr. 166-167, 227-228). On the same day the appellant was arrested (Tr. 228). Rideout picked the appellant out of a lineup on September 30, 1969, (Tr. 167-170, 232-233). There was no "big tall dark skinned Negro in the lineup" other than the appellant (Tr. 169), in the opinion of defendant's counsel. The court disagreed (Tr. 169).

After the lineup, Officer Klepfel showed Rideout a group of ten color photographs from which Rideout picked out the picture of the appellant (Tr. 170-171, 234-235). The appellant's picture showed him with a dark cap and dark rimmed

sun glasses (Tr. 235); it was the only photograph in which a man was pictured wearing a hat and glasses (Tr. 245). The photograph showed the black rimmed glasses to have green lenses; Rideout had described the lenses as blue after the robbery (Tr. 246).

The appellant testified that on August 20, 1969, he completed work at his first job, truck driver with M. S. Ginn Office Supply Company at 4:00 p. m. (Tr. 259-260). He then proceeded to his second job, District Manager of the Washington Daily News where he completed work around 7 or 8 p. m. (Tr. 259). Appellant then returned home to wash his car (Tr. 260). He then met his friend William Reginald Johnson at the apartment of three girls where he stayed for approximately two hours (Tr. 261-262, 292). He then went with his friend William Reginald Johnson to the latter father's apartment, arriving at between ten and ten-thirty p. m. (Tr. 262, 293). Present at the apartment when they arrived were Mr. Johnson, Audrey Quick, Elsie Johnson, a lady named "Odella", (Mrs. Odella Solomon), and another lady who lived upstairs (Mrs. Evelyn Champion) (Tr. 262-264, 294-295). Charles Mont arrived later (Tr. 414). Appellant is not related to William Reginald Johnson.

The assembled group played a card game known as "whist" with each team composed of two members. The winning team keeps playing while the losers give way to the next team. Appellant and William Reginald Johnson, because of their winning, played practically the entire time. (Tr. 263) It was between 1:30 and 2:00 a. m. before appellant went to bed (Tr. 298-299). He slept in the same room with William Reginald Johnson in the apartment. Appellant recalled that Elsie Johnson was up when he went to bed and possibly the lady upstairs but that he could

not saw for sure if anyone else was up (Tr. 303-304). He did not leave the apartment after he arrived until approximately 8:00 a. m. the next day, August 21, 1969 (Tr. 264-265, 296-297).

Appellant further testified that he was not clean shaven during the third week of August and in fact started growing his "fuzz" in June or July (Tr. 265, 299-300). A portrait drawn of appellant on the last weekend in August showed that appellant was not clean shaven at that time (Tr. 265-267). Appellant testified that the portrait was a fair representation of what his beard looked like the weekend before August 20, 1969 (Tr. 301).

Appellant testified that September 9, 1969, was the first time he had been to the McDonald's restaurant at 4801 Deane Avenue, Northeast (Tr. 281).

Elsie P. Johnson testified that she returned home to her apartment at the Park Southern (where she lived with her father) between 11:30 and 12:00 midnight on the night of August 20, 1969. Present were her sister, Audrey Quick, two neighbors, Odella Solomon, and Evelyn Champion, her brother William Reginald Johnson, Charles Mont, her father, Sidney Johnson and the appellant, Jimmy R. Johnson. William Reginald Johnson and the appellant were playing bridge whist with Odella Soloman and Sidney Johnson and the others were awaiting turns to take over for the losing team (Tr. 319). Her brother and the appellant seemed to be winning every game as they were sitting at the card table for practically the whole duration of the game; this caused disputes and allegations from Mrs. Solomon that they were not playing fairly (Tr. 320).

Elsie Johnson did not leave the apartment again that night. She went to bed between 3:30 and 4:00 a. m. on the morning of August 21, 1969 (Tr. 320-321, 327). She recalled that her brother and the appellant went to bed in her brother's bedroom

between 1:30 a. m. and 2:00 a. m. on the morning of August 21, 1969 (Tr. 321). Later she received a long distance telephone call from Alaska at between 5 a. m. and 5:15 a. m. and when she finished at approximately 5:30 a. m. she woke up her brother and the appellant (Tr. 322, 327). She further testified that the appellant had a little goatee on his chin on the night of August 20, 1969, which she had noticed previously. (Tr. 328). She recalled that Charles Mont had arrived in his police uniform after work and stayed from around midnight to four in the morning (Tr. 326).

Sidney Johnson testified that the card game at his apartment began around 8:30 to 9 p. m. on August 20, 1969, and that the participants played until around 12 midnight or later (Tr. 332). He testified that his two daughters (Elsie Johnson and Audrey Quick), his son (William Reginald Johnson), two neighbors, a Evelyn Champion and Mrs. Solomon, Charles Mont and the appellant were playing cards or observing the game (Tr. 332-333). His son and the appellant played together as a team (Tr. 334). The appellant and William Reginald Johnson arrived at between 9:30 and 10:00 p. m. and never left that evening. They went to bed between 1:30 and 2:00 a. m. on the morning of August 21, 1969, and stayed in his son's bedroom (Tr. 333-334, 342-343). After they went to bed the game continued. Mr. Johnson never saw the appellant leave the apartment after the appellant retired to bed (Tr. 335-336). Mr. Johnson played until he went to bed at 3:00 a. m. or after (Tr. 336).

Audrey Quick, the daughter of Sidney Johnson went to her father's apartment on August 20, 1969, to plan a surprise birthday party with her sister Elsie Johnson for her father (Tr. 351). She arrived at between 6:30 and 7:00 p. m., ate dinner,

sat around for a while and then, at approximately 10:00 p. m., began to play cards with the assembled group. The group consisted of her father, Sidney Johnson, her sister, Elsie Johnson, her brother, William Reginald Johnson, two neighbors, Evelyn Champion, and Odella Solomon, Charles Mont and the appellant (Tr. 352-353). She testified that her brother and appellant came to the apartment between 10:00 and 10:30 p. m. on August 20, 1969 (Tr. 353). They played cards and were winning most of the time so they remained seated at the card table. Charles Mont was her card partner (Tr. 354). Mrs. Quick spent the night at the apartment, going to bed about 1:30 a. m. (Tr. 355). Her brother and appellant had gone to bed about a half-hour before she did, or around 1:00 to 1:30 a. m. (Tr. 355, 359-360). Mrs. Quick slept on the sofa in the living room, the card game being held in the dinning area. Her father and Mrs. Solomon were still playing cards when she went to bed (Tr. 356-357, 359-360). She testified she would have heard the appellant if he had left the apartment because she is a light sleeper (Tr. 360). She did hear the door open when Mrs. Solomon left, but did not hear it open at any other time (Tr. 361). She awoke at approximately 6:30 a. m. the next morning and woke her brother and the appellant up. They were asleep when she woke them up but were up when she left the apartment at 7:00 a. m. (Tr. 356-357, 362).

William Reginald Johnson testified that on August 20, 1969, after he left work at the M. S. Ginn Office Supply Company, he visited a girl friend and then went over to the appellant's house and talked to him about going over to an apartment shared by three girls. He found the appellant washing his car. The appellant said they would most likely meet at the girls' apartment (Tr. 368).

The appellant came to the apartment located at 4022 First Street, Southeast at about 8:00 p. m. (Tr. 368-369), and met William Reginald Johnson and the girls. They sat around and talked, went out to pick up some wine and ice and returned to the apartment (Tr. 369-370). Appellant and William Reginald Johnson left the girls' apartment at around 10:00 or 10:15 p. m. and went directly to Sidney Johnson's apartment (Tr. 370-371, 376). Present were Odella Solomon, Elsie Johnson, Audrey Quick, Mrs. Champion, Sidney Johnson and, later, Charles Mont (Tr. 370-371, 377). Appellant and William Reginald Johnson were partners and won all of the games, thus remaining seated at the table (Tr. 371).

William Reginald Johnson and the appellant went to bed at between 1:30 and 2:30 a. m. (Tr. 372). William Reginald Johnson was tired and disgusted because Mrs. Solomon was giving them a hard time, accusing them of cheating (Tr. 378). He recalled looking at a clock when he went to get a snack shortly before he went to bed and the clock showed 1:00 or 1:15 a. m. (Tr. 379). They slept in William Reginald Johnson's room (Tr. 372). To his knowledge the appellant did not get up at all after they went to bed (Tr. 372). Both arose the next morning between the hours of 6:30 and 7:00 a. m. (Tr. 372). Appellant was in bed with him when they woke up (Tr. 374).

Mrs. Odella Solomon testified that she went down to Mr. Sidney Johnson's apartment at around 9:30 p. m. on the night of August 20, 1969. Present during the course of the evening were Mr. Sidney Johnson, Miss Elsie Johnson, Mrs. Audrey Quick, William Reginald Johnson, Charles Mont, Mrs. Evelyn Champion and the appellant (Tr. 388-399). They commenced playing cards around 9. 30 p. m. Mr. Sidney Johnson was her

partner (Tr. 389). William Reginald Johnson and the appellant arrived between 10:30 and 11:30 p. m. She remembers the approximate time of their arrival because she had to put her children to sleep (Tr. 391). She played with William Reginald Johnson and the appellant until between 1:00 and 2:00 a. m. when they went to bed (Tr. 389-392). She recalled the approximate time because there was a clock directly in front of her (Tr. 392). She played a different card game with Mr. Johnson until about 3:00 a. m. and the appellant and William Reginald Johnson were still in bed (Tr. 390, 393). She recalled this particular night as the one in which she was to talk with Mr. Johnson's daughter about a birthday party for Mr. Johnson (Tr. 393).

Mrs. Evelyn Champion testified that she went down to Mr. Johnson's apartment around 9:00 p. m. on August 20, 1969. Present during that evening were Mr. Johnson, Elsie Johnson, Audrey Quick, Charles Mont, Mrs. Solomon, William Reginald Johnson and the appellant. She did not play cards that evening but observed the game. (Tr. 401). She did not recall when William Reginald Johnson and the appellant came in (Tr. 402). She left between 1:00 and 2:00 a. m. (Tr. 402, 404). She recalled the time because she returned to her apartment and played the radio (Tr. 404). When Mrs. Champion left the appellant was still seated and playing cards (Tr. 402).

Officer Charles Mont of the Metropolitan Police Department testified that upon completing his 4:00 to 12:00 p. m. shift he went to Mr. Johnson's apartment at 880 Southern Avenue, Southeast (Tr. 414). He arrived there at approximately 12:30 to 12:45 a. m. (Tr. 414). When he arrived there were present Miss Elsie

Johnson, Mrs. Solomon, Mr. Sidney Johnson, a resident of the apartment, several other people whom he did not remember and the appellant (Tr. 415). He played cards and on occasions played against the appellant. William Reginald Johnson was the appellant's partner (Tr. 415-416). Elsie Johnson was Officer Mont's partner (Tr. 416). He recalled an argument involving Mrs. Solomon and the appellant (Tr. 417). Officer Mont did not recall when the appellant went to bed. He stayed until 3:30 or 4:00 a. m. and did not recollect the appellant leaving the apartment (Tr. 416). He testified that if the appellant had left the apartment for 45 minutes or an hour he would have remembered it, but that if he had left for 15 or 20 minutes he doesn't think he would have remembered (Tr. 428). He thought that the last time he had seen the appellant was about 3:00 a. m. although he could not recall what the appellant was doing (Tr. 427). Mont recalled that he (Mont) was playing cards at the time and he does not recall the appellant playing at that time (Tr. 427).

Richard Brown testified that from 1962 to June 1969 he was employed by the Citywide Detective Agency as Captain of the Guards. He was a special policeman and authorized to carry a gun. The detective agency had a contract to provide security for the McDonald's at 4801 Deane Road (Tr. 430-431, 434).

As Captain of the Guards, Brown would physically spend a shift at all McDonald's stores under contract. He was familiar with the practices and procedures at the McDonald's located at 4801 Deane Avenue. During the 4-1/2 years prior to June of 1969, he would go to that McDonald's once a day on his own and any other time when called by a guard (Tr. 434). He had also been there when the store was being closed and helped them close down the shop approximately four

times within a one year period. The last time he helped close up was in April of 1969. Mr. Rideout was in charge (Tr. 434, 435, 436). Brown stated that the procedure was that the money was counted by the Assistant Manager. Sometimes he tells the guard to go to the bank with him. At other times he puts the money in the safe. On this occasion Rideout went to the bank accompanied by Brown (Tr. 437). Brown testified that there were two locks on the back door; a padlock and a door lock. The Assistant Manager would have keys to the front door but only a key to the padlock on the back door (Tr. 438). Only the Manager had the combination of the safe (Tr. 438). Removal of a dollar bill inside the safe activates the alarm system (Tr. 439). After closing, all lights stay on in the building as well as all lights on the outside next to the building (Tr. 432, 440).

On cross-examination Brown testified that he had met the appellant at a dance but did not know him personally (Tr. 441). Although Citywide had the contract at the Ginn Furniture Company, he never saw the appellant working there (Tr. 442). Brown replied negatively to the prosecutor's question of whether he owned a M-1 carbine rifle (Tr. 444). He stated he did not know whether Rideout had the keys to the back door of the restaurant (Tr. 444). He recalled that he was working at Rogers Memorial Hospital from 11:00 p. m. on August 20, 1969, to 7:00 a. m. August 21, 1969. (Tr. 445). He replied negatively to a question by the prosecuting attorney asking if he could have been driving down Benning Road in the vicinity of Oklahoma Avenue with a handkerchief over his face on the night of August 20, 1969 (Tr. 446).

Thomas Mills director and president of Citywide Detective Agency stated that

Richard Brown was employed for roughly eleven months, "if you put the whole time together" (Tr. 452-453, 457). He stated that Brown was not Captain of the Guards but merely did some driving for him; that he did not have a special commission as a special police officer; and that he was never authorized to carry a gun when he worked for him (Tr. 453-454). He stated that Brown came into contact with the drivers that come into Ginn's (Tr. 456). Mills stated that he worked very closely with the police (Tr. 458). Mills admitted under cross-examination that Brown patrolled McDonald's and was as familiar with the McDonald's at 4801 Deane Avenue as he was (Tr. 461).

On June 24, 1970, appellant's counsel filed a Motion for New Trial based on affidavits of Richard Brown and Elsie Johnson. Both persons stated on their oath that on June 16, immediately after Thomas Mills testified and at the beginning of the luncheon recess, Mills admitted that he had lied in his rebuttal testimony about Brown in order to protect his detective license. (Record on Appeal). The trial judge had taken no action on that motion as of September 3, 1970, nor thereafter.

I. THE CASE SHOULD BE REMANDED FOR DISMISSAL OF FOR A DISPOSITION OF APPELLANT'S MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE, SAID MOTION HAVING BEEN FILED WITHIN FIVE DAYS OF APPELLANT'S CONVICTION, BUT NOT ACTED UPON, BECAUSE THE TRIAL COURT, WITH SEVERE PREJUDICE TO THE APPELLANT, ABUSED ITS DISCRETION IN NOT CONSIDERING THE MOTION WHICH WAS BASED ON RECANTATION OF THE TESTIMONY OF A PRINCIPAL PROSECUTION WITNESS.

(Defendant's Motion for a New Trial with attached affidavits and supporting Memorandum of Points and Authorities; Tr. 154; 430-431; 438; 440-447; 463-464.)

On June 24, 1970, appellant filed a Motion for a New Trial with Points and Authorities pursuant to Rule 33, Fed. R. Crim. Proc. The basis of the motion was that testimony of the Government's sole rebuttal witness, Thomas Mills, was false. Affidavits of Elsie Johnson and Richard Brown, both defense witnesses, were attached and recited, in essence, that Mills had stated to them that he had lied in order to protect the license of his detective agency. (Defendant's Motion for New Trial and Attached Affidavits). The trial judge has not heard the motion nor ruled upon the motion.[1/]

The testimony of Mills was critical to the Government's case. Brown, testifying for the defense, had stated that two keys were required to gain entrance to McDonald's through the back door (Tr. 438); this testimony fundamentally contradicted the testimony of Rideout, the Government's sole eyewitness (Tr. 154). Mills stated that he was the director of the defective agency by which Brown had testified he was employed (Tr. 453); that Brown was a chauffeur and not a detective (Tr. 454 contradicting Tr. 430); that Brown was

1/ Nor has the court below availed itself of the procedure established in United States v. Gordon, 246 F. Supp. 522 (D. D. C., 1965); Gordon v. United States, 127 U. S. App. D. C. 343, 383 F. 2d 936, cert. denied, 390 U. S. 1029 (1967).

not a captain in the agency (Tr. 454 contradicting Tr. 430); that Brown did not have a permit to carry a gun (Tr. 454 contradicting Tr. 430-431); that Brown had left his employment with the agency under suspicious circumstances (Tr. 456-457 contradicting Tr. 440-441); that the agency had a contract with Ginn and Company, the employer of the appellant, which by inference suggested that the contract was in effect during the entire time appellant was employed by Ginn (Tr. 455-456 contradicting the Affidavit of Elsie Johnson attached to Defendant's Motion for a New Trial), and that Brown was familiar with the activities of truck drivers at Ginn and at the McDonald's that was robbed (Tr. 455-456).

The last two mentioned factors were used in the course of questioning by the prosecuting attorney to infer that Brown was involved with the appellant in the robbery of McDonald's for which the appellant was on trial (Tr. 442-447). The prosecution asked Brown such questions as whether he owned a carbine or was driving around in the vicinity of Benning Road on the night of the robbery with a handkerchief over his face. Counsel for the appellant sought permission to call the defendant as a surrebuttal witness proffering to the court that defendant would testify that he was employed by M.S. Ginn and Co., from December 1968 to September 1969; that he had worked only one day at the L Street warehouse, and that he had met the witness Brown for the first time on May 31, 1970 during the course of a party. After hearing objections from Counsel, the court denied the request of appellant and closing arguments were immediately commenced (Tr. 463-464).

Appellant's Motion for New Trial was filed within five days of the guilty verdict, as computed under Rule 45(a), Fed.R.Cr.Proc. As argued in the Points and Authorities of appellant's trial counsel (Defendant's Memorandum of Points and Authorities in Support of Motion for a New Trial, pp. 3-4), because of the timely filing of the motion a relatively lighter burden is placed upon the movant. Brodie v. United States, 111 U.S.App.D.C. 170, 172-73, 295 F.2d. 157, 159-60 (1960). Under this lighter burden, the appellant was required to meet the three fold test of Larrison v. United States, 24 F.2d 82 87-88 (7th Cir., 1928), in order to sustain his motion below. Appellant's Points and Authorities set forth his position that the test of Larrison was met. (Memorandum of Points and Authorities in Support of Motion for a New Trial, pp. 4-6).

Appellant first argues that the Trial Court's failure to act on the Defendant's Motion for a New Trial based on an allegation of perjury of one of the Government's principal witnesses and appellant's subsequent incarceration while the motion was pending was so severely prejudicial to his rights that the case should be remanded to the District Court with an order that the judgment against the appellant be vacated and the case dismissed.

In the alternative, the appellant submits that the trial court's failure to act in any manner to date on the motion constitutes an abuse of discretion, warranting remand of the case.

The Supreme Court in 1892 ruled that a trial court must at least exercise its discretion and not let a motion languish, as the District Court has done in

the instant case. In Mattox v. United States, 146 U.S. 140 (1892), the Court held that a trial judge who excluded affidavits in support of a motion for new trial should be compelled to examine the contents of those affidavits and to exercise his discretion in respect of the matters stated therein.

Similarly, in Harrison v. United States, 7 F. 2d 259 (2d Cir., 1925), the Second Circuit held that a trial judge should be compelled to review a motion for new trial on its merits. In that case, the court below had erroneously concluded that recantation of a material witness was not grounds for a new trial. A fortiori, in the instant case, where the court below has not even derived any conclusion, the trial judge at least should be compelled to review the motion.

The appellant submits that he has been so substantially prejudiced by the delay in acting on his motion for new trial that his case should be dismissed. The prejudice inheres in his having already been incarcerated for a period of five months while his motion languished and until his court-appointed counsel obtained his release pending appeal. Since his release on November 25, 1970, he has been subject to restrictions on his freedom of movement, by the conditions imposed by the court below. Further, the many months that have elapsed since his Motion for New Trial was first made must necessarily result in a clouding of the memories of the affiants in support of the motion and of the allegedly recanting prosecution witness.

A Motion for New Trial, particularly one made within five days of the appellant's conviction, is an integral part of the criminal proceedings against him. Consequently, a failure of the trial court to act expeditiously on the

motion is tantamount, it is submitted, to a denial of appellant's right to speedy trial. Cf., U.S. ex. rel. Ford v. Yeager, 287 F.Supp. 347 (D.N.J. 1968) (unreasonable delay in sentencing violates Sixth Amendment right to speedy trial under Fed. R. Crim. Proc., Rule 32(a)); Miller v. Rodriguez, 373 F.2d 26, (10th Cir., 1967) (to the same effect). See, Bynum v. United States, 133 U.S.App.D.C. 4, 408 F.2d 1207 (1968) (right to speedy trial); Blunt v. United States, 131 U.S.App.D.C. 306, 404 F.2d 1283 (1968) (on prejudice from delay). Under the circumstances present here, the case should be remanded to the District Court for dismissal or, at least, a new trial.

II. THE DISTRICT COURT ERRED IN THIS "PAPER THIN" CASE IN DENYING APPELLANT'S MOTION FOR ACQUITTAL BECAUSE THE JURY, WHOSE VERDICT WAS PREMISED ON A ONE-MAN IDENTIFICATION WAS PREJUDICED BY THE PROSECUTING ATTORNEY'S IMPROPER IMPLICATION, WITHOUT FOUNDATION, THAT A PRINCIPAL DEFENSE WITNESS WAS INVOLVED IN THE ALLEGED ROBBERY AND BY OTHER IMPROPER STATEMENTS AND ERRORS IN THE TRIAL BELOW.

(Tr. 208-209, 222-224, 244, 399, 430-431, 405-406, 440-447, 453-454, 456-457, 461, 463-464, 487-488).

A. IDENTIFICATION IN A "PAPER-THIN" CASE

It has been recognized by this Court, as indicated hereinafter, that the record must be scrutinized for improper and unfair statements by the prosecuting attorney in what has been termed a "paper-thin" case. Rigorous review of the effect of these statements is particularly mandated in the instant case because conviction of the appellant hinged on the credibility of appellant's alibi witnesses and of the uncorroborated identification . . . by

the Government's sole eye-witness, Rideout.

The possibility of mistaken identification of appellant by Rideout is well grounded in the record of the proceedings below.[/] For example, it was established that Rideout described the larger of the two robbers, allegedly the appellant, as being five feet, eleven inches, to six feet tall, and one hundred and fifty pounds in weight; this description was given to the police immediately after the sole witness had ample opportunity to view the two robbers on the early morning of August 21, 1969. To the contrary, the appellant was officially measured by the police after his arrest as six feet, three and one half inches, and weighing two hundred and seven pounds.(Tr. 244). And, it should be noted in testing the quality of Rideout's identification that he stands five feet, eleven inches tall and weighs two hundred and twelve pounds. (Tr. 209).

_/ The admission into evidence of the identification by the sole eyewitness is subject to question under United States v. Wade, 388 U.S. 230 (1968), Clemons v. United States, 133 U.S. App. D.C. 27, 408 F. 2d 1230 (1968, and their progeny. Even if it survives Wade, however, the entire identification process of appellant by Rideout should be considered by this Court as part of appellant's argument that the case was "paper-thin ," for as the Wade Court said, "understandable outrage may excite vengeful or spiteful motives" in victims of crimes. 388 U.S. at 230. Further, it may reasonably be said that outrage may color the perceptions of victims of crimes, as was admittedly the case with Rideout. (Tr. 208 wherein Rideout admitted his fear).

Additionally, the high Court noted the dangers of suggestiveness in photographic identifications in Simmons v. United States, 390 U.S. 377, 383, 384 (1968). The problem of suggestiveness is particularly great in the instant case because the first photographic identification of the appellant by Rideout on September 11, 1969, may have been based upon Rideout's observation of appellant at McDonald's on September 9, 1969, rather than upon Rideout's observation of the appellant on the night of the alleged robbery on August 21, 1969.

The deviation between the description initially given and the facts is substantial. Compare with Gregory v. United States, 133 U.S.App.D.C. 317, 324, 410 F.2d 1016, 1023 (1969)(description approximately correct as to weight and height). All of the alibi testimony, which included testimony by seven corroborating witnesses, (all unrelated to appellant), besides the appelant, one of whom was a Metropolitan Police official, subjects to question Rideout's identification. (Tr. 313-452). Finally, the many hours of deliberation by the jury before it arrived at its guilty verdict indicate that the case was a "paper-thin" one. (Tr. 487-488).

This Court has repeatedly recognized the dangers of prejudice that inhere in a one-man identification or "paper-thin" case. E.g., Jones v. United States, 119 U.S.App.D.C. 213, 214, n.3 338 F.2d 553, 554 n.3 (1964); McFarland v. United States, 80 U.S.App.D.C. 196, 150 F.2d 593 cert. denied 326 U.S. 788, rehearing denied 327 U.S. 814 (1945); King v. United States, 125 U.S.App.D.C. 318, 324, 372 F.2d 383, 389 (1967); Corley v. United States, 124 U.S.App.D.C. 351, 352, 365 F.2d 884, 885 (1966); Gregory v. United States, 125 U.S.App.D.C. 140, 145-146, 369 F.2d, 185, 190-191 (1966). See, Berger v. United States, 295 U.S.78, 89 (1935). Cf., Chapman v. California, 386, U.S. 18, 22 (1967); United States v. Evans, D.C. Cir. No.23,046, decided January 7, 1971, at 22 (Bazelon, C.J., dissenting). In light of the standards established in these cases and the prejudicial errors which occurred during the course of the proceedings below, as are described hereinafter, appellant submits that the case must be reversed and remanded for a new trial or remanded and dismissed.

3. PREJUDICIAL ERROR WHICH TIPPED THE SCALES IN THIS "PAPER THIN" CASE.

The many improper and prejudicial statements and questions of the prosecuting attorney during the course of the trial must have substantially prejudiced the appellant's defense against the veracity of the one-man identification and defense establishing the alibi. The standards to which a prosecutor is held in the exercise of his discretion are subject to review. See, Scott v. United States, 135 U.S. App. D.C. 377, 419 F. 2d 264 (1969). Cf., Johnson v. United States, 121 U.S. App. D.C. 19, 347 F. 2d 803 (1965). In this case, the prosecutor's course of improper questioning seriously impaired appellant's efforts below to present his alibi defense, and in effect, unjustly shifted the burden of proving it onto him. See, Stump v. Bennett, 398 F. 2d 111 (8th Cir., 1968), cert. denied, 393 U.S. 1001 (1968).

The prosecution's questioning of Brown, appellant's last witness below, was particularly noteworthy in this respect. First, after establishing that Brown was acquainted with the appellant by cross-examination, the prosecuting attorney suddenly asked Brown, "Do you own an M-1 carbine, sir?" The transcript continues:

"A. No, I don't.

"Q. Have you ever owned one?

"A. No, I haven't.

"Q. Have you ever seen one?

"A. No." (Tr. 444)

At that point the prosecution abandoned the line of questioning and never returned

to it. A carbine was supposedly used in the robbery (Tr. 222-224). There is nothing in the record to establish that Brown owned such a rifle.

Second, the prosecuting attorney asked a series of questions about "trouble" occurring at various McDonald's that were guarded by Brown, referring to burglaries and robberies (Tr. 443-444). There is no relevance which can reasonably be attributed to these questions, unless the prosecuting attorney could establish that Brown was actually involved in robberies or burglaries of these stores. The prosecution proffered no evidence to that end.

Finally, the most prejudicial question posed to Brown by the prosecution came at the end of his cross-examination:

"Q. Could you have been driving down Benning Road in the vicinity of Oklahoma Avenue with a handkerchief over your face on the night of August 20?

"A. No, sir.

"Q. Are you sure of that, sir?

"A. I'm positive.

MR. EARNEST: I have no further questions, Your Honor."
(Tr. 446-47)

There is no evidence in the record to sustain the clear implication of this question, and of the others already mentioned, that Brown was involved in the robbery. It is impermissible to impute a criminal act to a witness for impeachment purposes without the sustaining proof of a conviction. Lee Won Sing v. United States, 94 U. S. App. D. C. 310, 311, 215 F.2d 680, 681, (1954).

And, from a practical standpoint, the defense was helpless to object, for to

do so would only highlight the magnitude of the procecutor's accusations to the jury. This Court has noticed and considered such error on appeal even when not objected to at trial. See, Gaither v. United States, 134 U. S. App. D. C. 154, 172, 413 F. 2d 1061, 1079 (1969).

For that matter, much of the testimony of the prosecution's witness, Mills, whereby the Government impugned the credibility of Brown, was well beyond the permissible limits of rebuttal.[2/] First, the prosecuting attorney's cross examination of Brown (Tr. 440-447), did not lay a foundation for the impeaching testimony about Brown's employment as a chauffeur in Mill's detective agency (compare Tr. 430 with Tr. 453-54, 461), nor about his authorization to carry a gun or his having a special police commission (compare Tr. 430-431 with Tr. 454). It is well established in this jurisdiction that an adequate foundation must be laid for impeachment of a witness by rebuttal testimony. Osborne v. McEwan, 194 F. Supp. 117 (. D. D. C., 1961) (Holtzoff, J.). Second, the prosecution's

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2/ In addition, it is at least subject to question whether the trial judge was in error in refusing to permit the appellant to testify in surrebuttal to respond to the inferences that could be drawn from Mills' testimony. (Tr. 463-64). Although it is clearly within the sound discretion of the trial judge to establish the limits of rebuttal testimony, Brook v. United States, 128 U. S. App. D. C. 19, 26, 385 F. 2d 279, 286 (1967), in this instance the District Judge's refusal to permit the surrebuttal testimony may constitute an abuse of discretion in light to the expansive scope of the rebuttal testimony of Mills.

rebuttal witness, Mills, testified about the circumstances of Brown's separation from his employment (Tr. 456-457), a matter which was clearly collateral to the issues of the case and therefore not admissible. See, 3 Wigmore on Evidence §1002, p. 656 (3d. ed. 1940), Kantor v. Ash, 215 Md. 285, 137 A. 2d 661, 664 (1958). Further it is well established that impeachment by introduction of evidence of prior bad acts is not permissible. See United States v. Provoo, 215 F. 2d 531 (2n Cir., 1954), aff'd 350 U.S. 857 (1955); Orfield, Impeachment and Support of Witnesses in Federal Criminal Cases, 11 U. Kan. L. Rev. 447, 460-464 (1963).

In his questioning of Evelyn Champion, one of the appellant's alibi witnesses, the prosecuting attorney transgressed the limits of proper cross-examination by misquoting the witness, as follows:

"Q. Just a minute. You said Mr. Johnson remembered that he got paid.

"A. That was on a Wednesday. We were trying to get the birthday party, and that is the reason I know it was the 20th, getting prepared for the birthday party. [Emphasis supplied]

"Q. You say that is the reason why "we know it was the 20"? [Emphasis supplied]

"A. The reason why I know, the reason why I know it was the 20th.

"Q. Didn't you use the word "we"?

"A. Yes, I did.

"Q. Who else are you referring to?

"A. Who else was I referring to?

"Q. I am asking you, ma'am. Who is the "we" that you are referring to?

"A. Well, I made a mistake. I said I meant myself.

"Q. Isn't it true, ma'am, that you have talked about this case with other people before today?

"A. Sure, we talked about it.

(Tr. 405-406)

Finally, the prosecutor continually argued with the witness, unnerving them and affecting their testimony, until ultimately admonished by the Court (Tr. 399).

C. CUMULATIVE EFFECT OF ERROR IN THIS CASE.

As stated Per Curiam in Jones v. United States, 119 U. S. App. D. C. 213, 388 F. 2d 553 (1964),

> "It is generally held that whether improper conduct of Government counsel amounts to prejudicial error depends, in good part, on the relative strength of the Government's evidence of guilt." 119 U. S. App. D. C. at 214, n. 3, 338 F. 2d at 554, n. 3.

In the proceedings below, as already discussed, there were numerous instances where Government counsel erred in the presentation of the prosecution's case. That the prosecuting attorney had a difficult task before him in that he was confronted with seven alibi witnesses, all unrelated to the appellant-defendant, no doubt required rigorous cross-examination of these witnesses. However, it is submitted that he clearly transgressed the line of propriety on numerous

occasions in an attempt to establish his case; on those occasions, the prejudice to appellant's defense is manifest. The prosecutor was, by his error, able to raise substantial doubt in the minds of the jury about the veracity of all seven alibi witnesses, including a police officer; he was able to impugn the credibility of the last defense witness by ranging far beyond the normally prescribed limits of rebuttal. As a result of the cumulative effect of these errors, the jury returned its guilty verdict, but only after somewhat lengthy deliberations. We submit therefore, that the tainted verdict must be overturned. 3/

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction should be reversed or that the case should be remanded for hearing of the Motion for New Trial.

S/_____

WILLIAM W. BECKER
Appointed by this Court)
Federal Bar Building, West
1819 H Street, N. W.
Washington, D. C.

February 16, 1971

Of counsel:

Howard J. Feldman, Esq.
Joseph Fowler
Mark Bayer

3/ It should be noted that the District Judge, in denying appellant's motion for bail pending sentencing, on June 26, 1970, stated that no alibi witnesses placed appellant in the apartment at 880 Southern Avenue at the crucial time after 1:30 a. m. on August 21, 1969. (Transcript of June 26, 1970, Hearing at 12-13). The Judge's recollection is not supported by the record (Tr. 390, 393, 416). This incorrect recollection might well have colored the trial judge's decision not to grant appellant's motion for acquittal below.

CERTIFICATE OF SERVICE

This is to certify that a copy of this brief was hand-delivered to the United States Attorney, United States Court House, Washington, D. C. 20001, this 16th day of February, 1971.

William W. Becker, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1576
No. 24,714

UNITED STATES — Plaintiff-Appellee

v.

JIMMY R. JOHNSON — Defendant-Appellant

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT ON APPEAL FROM DENIAL OF MOTION FOR NEW TRIAL

OF COUNSEL:
Howard J. Feldman

WILLIAM W. BECKER
(Appointed by this Court)
Federal Bar Building West
Suite 950
Washington, D.C. 20006

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AUTHORITIES CITED

OTHER REFERENCES

* Cases or authorities chiefly relied upon are marked by asterisks.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1576
No. 24,714

UNITED STATES — Plaintiff-Appellee

v.

JIMMY R. JOHNSON — Defendant-Appellant

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRCT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT ON APPEAL FROM DENIAL OF MOTION FOR NEW TRIAL

STATEMENT OF ISSUE PRESENTED

Whether the District Judge erred in denying Appellant's Motion for a New Trial, filed within 7 days of the guilty verdict, because the Court did not consider whether a new trial was warranted "in the interest of justice" as required under Rule 33 of the Federal Rules of Criminal Procedure.

INSTANCE WHEN CASE PREVIOUSLY BEFORE COURT

This case is already before the Court as No. 24,714, an appeal from a judgment of the District Court which was consolidated with this appeal, No. 7156 by Order of the Court filed August 10, 1971. Reference is made to Brief and Supplemental Brief for the Appellant filed under No. 24,714.

REFERENCES TO RULINGS

In addition to the References made in Appellant's Brief (p. 3) and Supplemental Brief (p. iii), reference is herein made to the following rulings of the United States District Court for the District of Columbia, Criminal No. 1866-69; 1971 Tr.* 11, 12-14, 44, 45-49; Order dated July 21, 1971.

*References designated "1971 Tr." refer to the Transcript of Proceedings in Criminal Case No. 1866-69 on June 22, 1971 (Hearing on Motion for New Trial). References designated "Tr." refer to Transcript of Testimony in the same case on June 11, 12, 15, 16 and 17, 1970 (trial transcript). References designated "Voir Dire Tr." refer to the transcript of proceedings, voir dire examination, in the same case on June 12, 1970.

STATEMENT OF THE CASE

This case, No. 71-1576, represents the appeal of Jimmy R. Johnson from the denial of the United States District Court for the District of Columbia (D. J. Aubrey E. Robinson, Jr.) of his Motion for New Trial in Criminal Case No. 1866-69. Already before this Court is an appeal from the judgment in the same District Court action entered against appellant on June 17, 1970, No. 24,714 which has been briefed but not as yet set for oral argument. The two appeals were consolidated by order of the court.

Other proceedings related to the case are set forth on page 4 of appellant's brief in No. 24,714. Additionally, on May 20, 1971, the Government served a Motion to Revoke Bond Pending Appeal. After consideration of appellant's Points and Authorities in Opposition thereto, the District Judge denied the Government's Motion by Memorandum and Order dated June 16, 1971.

On May 25, 1971, the Government served its Points and Authorities in Opposition to the Motion for New Trial. A hearing was held on the Motion on June 22, 1971, and was denied by the District Judge orally on June 22 and confirmed in his Order filed July 21, 1971.

STATEMENT OF FACTS

On June 22, 1971 Judge Aubrey E. Robinson presided in the hearing of appellant's Motion for a New Trial. Counsel below for the appellant informed the Court that in support of his Motion he would call two witnesses: Mr. Richard Brown and Miss Elsie Johnson (1971 Tr. 2).

Counsel for appellant proffered that Mr. Brown would testify that he was employed by City-Wide Detective Agency for 4-1/2 years doing investigative work and eventually became a special policeman; that Mr. Mills gave him a commission to carry a gun and would supply such weapon on a daily basis; that he would explain the circumstances of his termination in the employment of Mr. Mills including allegations involving a carpet and the use of a new car purchased by Mr. Mills; and that during a recess in the trial of this case he had asked Mr. Mills why he had testified as he did on the stand and that Mills replied that he had done so to protect his license (1971 Tr. 2-3).

Counsel for the appellant proffered that Miss Johnson would testify that she overheard the conversation during a recess of the trial between Mr. Brown and Mr. Mills and that Mr. Mills stated that he had to testify the way he did in order to protect his license (1971 Tr. 4).

Richard Brown testified that he had worked for the City-Wide Detective Agency, sporadically, for 4-1/2 years. He produced a City-Wide Detective Agency identification bearing his picture and other

pertinent statistics, dated January 13, 1968 and signed by a company official. The back of the identification card requested that the bearer be extended all courtesies in connection with his duties as guard, special officer and investigator (1971 Tr. 6-8).

Mr. Brown testified that after the April 1968 riots a new unit was established within the City-Wide Detective Agency which supplied guards for businesses. He stated that he became one of these guards, or a special policeman, and was given a written commission to carry a gun at the same time Mr. Mills handed out commissions to other special policemen. Mr. Brown further testified that he never carried his weapon home but that Mills delivered the weapon to him each day and picked it up at closing time (1971 Tr. 8-10).

Mr. Brown testified further that he left the employ of City-Wide after he had been accused of stealing carpets, an accusation which he denied (1971 Tr. 10). The court denied counsel's attempt to elicit the circumstances of this dismissal from Brown. The Court also denied counsel's attempt to obtain the facts surrounding Brown's dismissal on a second occasion involving use of Mr. Mills' car (1971 Tr. 11).

Mr. Brown testified that during the recess he approached Mr. Mills about the conflict between the two of them and Mr. Mills stated that his license was at stake. He further stated that he talked to Mills

and his father for approximately 15 minutes (1971 Tr. 16-19).

On cross-examination Mr. Brown testified that he had not received his commission from police authorities but directly from Mr. Mills. He reiterated that Mr. Mills had said that he had testified the way he did because his license was at stake and that he was not going to lose his license (1971 Tr. 23-24).

Miss Elsie Johnson testified that during a luncheon recess she overheard a conversation between Mr. Brown and Mr. Mills. Mr. Brown asked Mr. Mills why he testified as he did, saying that Mr. Brown did not work for him when the testimony was not true. She testified that Mr. Mills replied that he testified the way he did because he had to protect his license. She further testified that she was three feet from the place where the conversation took place (1971 Tr. 29-30).

Elsie Johnson further recalled other parts of the conversation, including: confirmation that the appellant was not working for Ginn's at the same time that City-Wide Detective Agency had a contract with Ginn's; and Mr. Mills' statement that after he had got into the courtroom and observed the testimony he felt it was quite possible Rideout could have stolen the money himself. (1971 Tr. 34).

On cross-examination she testified that the gist of Mills' statement was that if his license had not been at stake he would have

testified differently (1971 Tr. 35-36).

Mr. Mills testified that he had stated to Mr. Brown that he would not jeopardize his license for Mr. Brown (1971 Tr. 39).

The court denied counsel for the appellant's attempt to question Mr. Mills as to whether he gave the commission to Mr. Brown (1971 Tr. 45-46).

The Court held that Mills was not a material witness, and that the testimony only went to the credibility of the witnesses and was impeaching in nature. The judge denied appellant's Motion for a New Trial (1971. 48-49).

Reference is made to the Statement of Facts in the opening Brief for the Appellant in No. 24,714, for a full statement of the facts derived from the trial transcript.

ARGUMENT

THE DISTRICT JUDGE ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL, FILED WITHIN SEVEN DAYS OF THE GUILTY VERDICT, BECAUSE THE COURT DID NOT CONSIDER WHETHER A NEW TRIAL WAS WARRANTED "IN THE INTERESTS OF JUSTICE" AS REQUIRED UNDER RULE 33 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 33 clearly differentiates between a motion for new trial based on the ground of newly discovered evidence, which may be filed within two years after final judgment, and a motion for new trial based on any other grounds -- the motion filed by appellant below -- which must be filed within seven days after a guilty verdict. The two motions are clearly distinct as restrictive standards have been imposed on motions for new trial filed after the seven day period has expired.

In the instant case, appellant's motion for a new trial was filed five days after the June 17, 1970, verdict. But the District Judge, in denying the motion on June 22, 1971, applied the more restrictive "newly discovered evidence" post seven day standards of Larrison v. United States, 24 F. 2d 82 (7th Cir., 1928) in denying the motion. Appellant submits that the case should be remanded for a determination whether the motion should be granted "in the interests of justice," the proper standard for a motion filed within seven days of a guilty verdict.

This court and commentators ofttimes have noted that the very restrictive rules for motions based on newly discovered evidence are

not to govern consideration of a motion promptly made within seven days (before 1966, within five days) of a guilty verdict. Brodie v. United States, 111 U.S. App. D.C. 170, 172-73, 295 F.2d 157, 159-60 (1961); Benton v. United States, 88 U.S. App. D.C. 158, 160, 188 F.2d 625, 627 (1951); 2 C. Wright, Federal Practice and Procedure: Criminal §557 at 515-16 (1969). See, United States v. Schartner, 285 F. Supp. 193 (D.E.Pa. 1967); Mills v. United States, 281 F.2d 736, 741 (4th Cir., 1960). In ruling that a mother's testimony at a hearing subsequent to trial concerning her daughter's recantation required the granting of a promptly filed motion for new trial based on newly discovered evidence, this Court in Benton observed:

> "The provision of Rule 33 permitting a new trial if required in the interest of justice is broader in scope than the limitations which have been held applicable where the motion is based on newly discovered evidence." 88 U.S. App. D.C. at 160, 188 F.2d at 627.

In the instant case, appellant's motion was filed promptly on June 24, 1970, five days after the jury verdict on June 17, 1970, as calculated under the Federal Rules of Criminal Procedure, Rule 45. The motion prayed for a new trial "in the interest of justice," on the ground of the newly discovered evidence as was the situation in Benton. The standards of Brodie and Benton were urged upon the Court in appellant's Memorandum of Points and Authorities in Support of Motion

for a New Trial, p. 3; and at 1971 Tr. 46-47, among other places.[1/] But the trial judge did not determine whether the testimony of Mr. Mills was false in his denial of the motion at the hearing on June 22, 1971. Rather the judge applied the strict standards of Larrison v. United States, 24 F. 2d 82, 87-88 (7th Cir., 1928) and determined that Mr. Mills' testimony was "not material" (1971 Tr. 47, 48), that impeaching evidence was not sufficient grounds for appellant's motion (1971 Tr. 12), and that the standards of Thompson v. United States, 88 U.S. App. D.C. 235, 188 F. 2d 652 (1951) were not met.

Reliance on Thompson evidences the Court's error in passing on the Motion for New Trial. An examination of the Record of the Thompson case discloses that the Motion for New Trial therein was not filed promptly and that therefore the decision was governed by the "newly discovered evidence standard" rather than the more liberal "in the interest of justice" standard. 848 D.C. Bar Association,

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1/ Some confusion may have resulted from the appellant's own trial brief which cited the Larrison case and discussed "new discovered evidence." New evidence was a moving force for requesting a new trial "in the interest of justice". However, notwithstanding the use of terminology, trial counsel clearly requested the court to rule on his motion under the standards established for a Motion for trial promptly filed.

Records and Briefs, United States Court of Appeals D. C., No. 10626 (unpublished).

That the Court misconstrued the motion by adopting the Larrison standards is further demonstrated by the Court's rulings which limited appellant's examination of witnesses during the June 22, 1971, hearing, including the following:

(1) The Court did not permit appellant's trial counsel to question Mr. Brown about the stealing of carpet (1971 Tr. 10-11) although Mr. Brown had been accused of the deed by Mr. Mills at trial (Tr. 456) and the accusation was effectively utilized by the prosecuting attorney in cross-examination (Tr. 440-41). Mr. Brown's testimony, if permitted may have revealed the falsity of Mr. Mills impeaching trial testimony.

(2) The Court did not permit appellant's trial counsel to question Mr. Mills on cross-examination about the date of City-Wide Detective Agency's guard contract with Ginn's (1971 Tr. 44). Mr. Mills' testimony at trial implied that the contract was held at a time when Mr. Brown worked for City-Wide at Ginn's and the appellant worked for Ginn's as a truck driver (Tr. 259, 455-56); that the Government counsel's cross-examination of Mr. Brown was plainly contrived for the benefit of the jury to suggest that the appellant and Mr. Brown met at Ginn's (Tr. 442-43). Mr. Mills' testimony at the

June 22, 1971, hearing, if permitted, may have disclosed that City-Wide's contract with Ginn's was not at a time when Mr. Brown could have met the appellant, a fact which would be contrary to the unsubstantiated and improper impression left with the jury by the Government that the appellant knew Mr. Brown at the time of, and was involved with him in, the robbery of McDonald's (Tr. 444, 446-47).

(3) The Court did not permit appellant's trial counsel to question Mr. Mills about the date when City-Wide established a guard service (1971 Tr. 45), Mr. Brown having earlier testified that he had become a guard only after City-Wide established a guard service after the April 1968, riots (1971 Tr. 8). Further, the Court did not permit appellant's counsel below to question Mr. Mills about the procedures followed which might have resulted in Mr. Brown's thinking he had a police commission. (1971 Tr. 45-46). Mr. Mills' trial testimony (Tr. 454) impugned Mr. Brown's testimony that he was a special policeman and was authorized to carry a gun (Tr. 430-31). There is no question that Mr. Brown was under a misapprehension about his having special police authority (1971 Tr. 37). However, testimony by Mr. Mills at the 1971 hearings might have clarified <u>why</u> Mr. Brown thought he was a special police officer had the trial judge not ruled that defense counsel could not interrogate Mr. Mills on this

point (1971 Tr. 45-46). In this regard, the Court's attention is directed to a newspaper article appearing in the June 23, 1971, edition of The Washington Post, a copy of which is attached as Appendix A, in which it is related that a Washington, D. C. detective agency was charged with issuing false commissions purporting to permit guards to carry gunds and make arrests. By cross-examination of Mr. Mills, defense counsel might have been able to establish that a similar practice existed in City-Wide Detective Agency.[2/]

Each one of these points could, in itself be the basis of a new trial in "the interest of justice". Viewed cumulatively against that standard it is clear that the court erred in not determining whether appellant was entitled to a new trial in "the interest of justice". Argument has previously been made, in appellant's opening Brief, pp. 23-25, to the fact that the case against appellant was "paper-thin" and was based on the testimony of a single eyewitness.

2/ Other examples of the Court's delimiting the scope of the new trial hearing include the exclusion of evidence on a car accident (1971 Tr. 11) and on the length of employment of Mr. Brown by City-Wide (1971 Tr. 11-13).

Much of the strength of the Government's case against appellant was derived from the cross-examination of Mr. Brown and the testimony of Mr. Mills, which was in many respects improper. See, appellant's opening Brief, pp. 26-30. The prejudice which resulted was compounded when the trial judge did not permit appellant's counsel below to rehabilitate the testimony of Mr. Brown. (Tr. 463-64). But even more significantly, it may have been in large measure false -- an issue which was raised by the Motion for New Trial but which, as indicated by the trial judge's ruling delimiting the scope of the June 22, 1971 hearing, was not adequately considered by the trial judge in denying the motion. Langnes v. Green, 282 U.S. 531, 541 (1931) suggested that:

> "The term 'discretion' ... means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law ...." (emphasis added)

Appellant submits that the Court below did not act with regard to the law and that this action must be remanded so that the trial judge may exercise his discretion in ruling on the motion for new trial with due regard to the proper legal standards prescribed for a Rule 33 motion, promptly made within seven days, which seeks relief "in the interest of justice."

CONCLUSION

If this Court determines that the action should not be dismissed, the relief sought by appellant in No. 24,714, then appellant respectfully requests that the action be remanded to the District Court for reconsideration of appellant's Motion for New Trial for the reasons as set forth above.

S/
WILLIAM W. BECKER
Appointed by this Court
Federal Bar Building West
Washington, D. C.

September 10, 1971

Of Counsel:
Howard J. Feldman, Esq.

The Washington Post

Guard Firm Owner Held For Fraud

By Ivan C. Brandon
Washington Post Staff Writer

The owner of a local agency that supplies security guards for businesses has been arrested and charged with issuing false commissons permitting guards to carry guns and make arrests, police reported yesterday.

Detective Sgt. Lester Crockett said that John Payton, owner of the Nationwide Universal Agency at 1401 K St. NW, was arrested Friday after it was discovered that he had given illegal commissions to three men.

Crockett heads the special officers section of the police department, which keeps records on all private security agents and issues commissions to those who qualify as special policemen.

Under District of Columbia law a special policeman has almost the same authority as a metropolitan policeman. He is allowed to carry a gun and make arrests. To receive a commission as a special policeman, he must pass a screening test much like that for city policemen.

Security guards who do not have commissions have no police powers. There are 3,500 special policemen commissioned in Washington and 4,000 security guards.

Sgt. Crockett said the investigation of Payton began with a telephone complaint from a man who said he had quit Payton's firm.

Checking his files, Crockett said he found that Payton had three commissioned special officers working in Washington —at the Madison Hotel, the Pick Lee House, and Howard University's Book Store.

All the men's commissions had the same number, however, and that number belonged to a man who was commissoned last year, Crockett said. Payton is scheduled to be arraigned on June 28 in Superior Court.

CERTIFICATE OF SERVICE

This is to certify that a copy of this brief was hand delivered to the United States Attorney, United States Court House, Washington, D. C. 20001 this 10th day of September, 1971.

William W. Becker

No. 24, 714

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES, Plaintiff-Appellee

v.

JIMMY R. JOHNSON Defendant-Appellant

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR THE APPELLANT

OF COUNSEL:

Howard J. Feldman, Esq.,
Mark Bayer
Joseph Fowler

WILLIAM W. BECKER
(Appointed by this Court)
Federal Bar Bldg., West
Suite 950
Washington, D. C. 20006

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DISTRICT OF COLUMBIA

No. 24,714

UNITED STATES, Plaintiff-Appellee

v.

JIMMY R. JOHNSON Defendant-Appellant

ON APPEAL FROM A JUDGMENT OF THE UNITED
DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR THE APPELLANT

STATEMENT OF ISSUES PRESENTED

Whether under the limited discovery provisions of the Federal Rules of Criminal Procedure a trial judge erred in requiring a defendant to disclose the names of all of his witnesses during voir dire examination of the jury panel and before jeopardy attached.

REFERENCES TO RULING

In addition to references already made in the Brief of the Appellant, Appellant refers this court to the voir dire Tr. 7-11.*

* References designated voir dire Tr. refer to the transcript of proceedings voir dire examination in District of Columbia Criminal No. 1866-69, June 12, 1970.

ARGUMENT

III. UNDER THE LIMITED RULES OF DISCOVERY OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, THE TRIAL JUDGE ERRED IN REQUIRING THE APPELLANT TO DISCLOSE THE NAMES OF ALL OF HIS WITNESSES DURING VOIR DIRE EXAMINATION OF THE JURY PANEL AND BEFORE JEOPARDY ATTACHED.

During voir dire of the jury panel, in the presence of the prosecutor, and before commencement of the trial, the District Judge required appellant to disclose the names of his witnesses, over strong objection of his counsel (Voir Dire Tr. 7-11). In response to a request of the prosecutor, the trial judge also required appellant to disclose the addresses of those of his witnesses who were not present at the voir dire (Voir Dire Tr. 10). The disclosures assisted the United States Attorney's office in further investigation while the trial was pending which severely hampered Appellant's defense. For example, the prosecutor revealed that he had ascertained that defense witness William Reginald Johnson had a criminal record, which information was obtainable only after the witness' name was disclosed (Tr. 375). Further, the disclosure of Robert Brown's name led to key testimony on rebuttal by Mills, with the veracity of such testimony being subject to serious question as outlined in Appellant's Brief, pp. 17-20).

The justification for the court's ruling: disclosure was necessary to impanel an impartial jury (Voir Dire Tr. 9).

The essential question before this court is the scope of pretrial

discovery and its effect on the adversary system of justice. /1 Is pretrial discovery to be used by the government in such a way as to severely hamper the defense of an accused and thus initially tip, however slightly, the scales of justice against him?

Discovery by the government, as by the defendant, under the Federal Rules of Criminal Procedure is extremely limited. In re Magnus, Mabee & Reynard, Inc., 311 F. 2d 12 (2nd Cir.), cert denied sub nom Magnus, Mabee & Reynard, Inc., v. United States, 373 U.S. 902 (1962). Whenever discovery by the government is sanctioned by the Federal Rules, it is conditioned upon discovery by the defendant; if the defendant seeks no discovery, then under the Federal Rules the government can obtain no discovery. Rule 16(c). 8 Moore's Federal Practice ¶16.08[2] (2d Ed. 1970). In the instant case defendant s attorney never sought the names of the prosecution's witnesses under Rule 16(a)(2) or (b); consequently, the court was not authorized to require the defendant to submit to discovery by the government under Rule 16(c).

Further, the disclosures required of defendant by the trial judge in the instant case clearly are not within the confines of discoverable material as defined by Rule 16(c), which limits such material to:

/1 Jeopardy had not yet attached at the time that the disclosures were required by the trial judge. Newman v. United States, 133 U.S. App. D.C. 271 (1969), cert. denied, 396 U.S. 868 (1970).

> "scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial, and which are within his possession, custody or control; upon a showing of materiality to the preparation of the government's case ... " (emphasis added)

Rather, the disclosures required of appellant were the type of material, discovery of which by the government is specifically prohibited by the last sentence of subdivision (c):

> "Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys." (emphasis added)

A fundamentally important and critical portion of the trial attorney's preparation for trial, which we submit the above quoted language protects from discovery, is the list of witnesses which the attorney intends, or is considering, to use during the presentation of his case. Nevertheless, the trial judge in the instant case improperly required such disclosure and such ruling was clear error.

Nor can it be said that the ruling of the Court was necessary to insure an impartial jury. It is an accepted hazard of the jury system that a juror may know a witness, and the Federal Rules, with a view towards this contingency, provide in Rule 24(c) for alternate jurors. And, even without Rule 24(c), by insisting upon the list of witnesses for his defense, the trial court merely lessened the possibility that a juror might know one of

defendant's witnesses and be prejudiced thereby; for rebuttal witnesses were not required to be disclosed. Cf., VI Wigmore on Evidence 415 (3d Ed. 1940); Thompson v. State, 230 Md. 113, 186 Atl 2d 461 (1962). Thus in exchange merely for lessening the possibility of mistrial (of no particular benefit to the appellant) the appellant was required to give up the valued right secured by Rule 16 of the Federal Rules of Criminal Procedure, of protecting this information.

Pretrial discovery has always been restricted in criminal cases to afford the defendant the full opportunities of our adversary system. In a recent Supreme Court case dealing with pretrial discovery, Williams v. Florida, 399 U.S. 78 (1970), the court found the Florida "Notice of Alibi Rule" to be constitutional. However, it did not recommend or require that such a rule be followed in all jurisdictions or in federal forums. Thus there has been no pronouncement on this subject by the High Court. To the contrary such a rule has consistently been rejected when proposed as an amendment to the Federal Rules of Criminal Procedure. /2

/2 The Advisory Committee on Rules of Practice and Procedure withdrew such a proposal when it was rejected by the Supreme Court at the time the Rules were originally adopted in 1944. Wright, Proposed Changes in Federal Civil, Criminal and Appellate Procedure, 35 F.R.D. 317, 326 (1964). When the proposal was again presented in December, 1962, fears were expressed that the intensive investigation by the government which would probably follow upon notice as required by such a rule might discourage prospective alibi witnesses from testifying or from volunteering information to a defendant or his attorney in the first instance. Thus a defendant might be unduly prejudiced where he had a legitimate alibi defense. See, Everett,

The peculiar nature of the adversary system of justice, as prescribed by the Federal Rules, makes it incumbent upon the government to prove the guilt of the accused at a trial. The procedures which are prescribed are presumably the result of an effort by the drafters to strike a balance so as to obtain the objective of meting out justice.

There can be little doubt but that the delicate balance struck in the Federal Rules was upset in the instant case. It is indeed possible that the trial judge's ruling may have resulted in a verdict which does not comport with the underlying facts, a matter which has already been discussed in

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/2 Cont'd

Discovery in a Criminal Case: In Search of a Method, 1964 Duke L. J. 447, 498. Although the proposed amendment appeared in the 1962 version of the amendments, which became effective on July 1, 1966, 383 U. S. 1087 (1966), the proposal was eliminated from the 1964 version. Compare "Discovery in Federal Criminal Cases," A Symposium at the Judicial Conference of The District of Columbia Circuit, 33 F. R. D. 47, 113, (1963) with Second Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts, 34 F. R. D. 411 (1964). The proposal has not been rejuvenated to date as an amendment to the Federal Rules.

By order dated October 12, 1970, the United States District Court for the District of Columbia amended the Local Rules with new Rule 87, presumably pursuant to Fed. R. Crim. Proc., R. 57(a). Whether the new local rule is consistent with the Federal Rules, as is required by Rule 57(a), has not yet been considered by this Court. It is submitted, in light of the history in the Advisory Committee to promulgate such a rule, that the local rule is inconsistent. Nevertheless, even if the new Local Rule 87 is valid, the disclosures required of appellant in the instant case were broader than that required by the new local rule; and in any event, the local rule was not in effect at the time of appellant's trial below.

Appellant's Brief, pp. 23-33. No doubt the prosecutor, armed with this critical information, made a full investigation of all witnesses. With its tremendous resources the government is in a peculiarly advantageous position to investigate in detail witnesses for whom names and addresses are given. See, 8 Moore's Federal Practice at 16-8, 16-12 (2d Ed. 1970). In fact, the prosecutor discovered that defendant's witness, William Reginald Johnson, had a criminal record (Tr. 411-12), and he further found out, between the date that the disclosures were required on June 12, 1970, and the date of the testimony of Thomas Mills on June 16, 1970, that Richard Brown was employed by Mills. The prosecutor also had the opportunity to discuss Mr. Brown with Mr. Mills during that period and to develop the testimony which was presented in rebuttal which seriously impugned the credibility of Brown. It is that very testimony of Mills which has been attacked as perjured, subsequent to the rendering of the verdict, in the affidavits which were filed with Appellant's Motion for New Trial.

It is questionable whether the government would have had the opportunity to develop this tainted testimony of Mills had Brown's name not been disclosed before the trial began, but rather on the day of Brown's testimony. Thus a chain reaction started from the trial judge's erroneous ruling, with the final result a conviction based on dubious testimony. The ruling being in error and the damage from the disclosure already having been done, the conviction should be reversed and the indictment dismissed.

CERTIFICATE OF SERVICE

This is to certify that a copy of this Supplemental Brief was hand delivered to the United States Attorney, United States Court House, Washington, D. C. 20001 this 17th day of March, 1971

Howard J. Feldman

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 24,714 and 71-1576

UNITED STATES OF AMERICA, *Appellee,*

v.

JIMMY R. JOHNSON, *Appellant.*

Appeal from the United States District Court for the District of Columbia

---

HAROLD H. TITUS, JR.,
United States Attorney.

JOHN A. TERRY,
BROUGHTON M. EARNEST,
C. MADISON BREWER,
Assistant United States Attorneys.

Cr. No. 1866-69

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OTHER REFERENCES

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* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Did the trial court commit reversible error in requiring appellant to identify his prospective witnesses during the voir dire examination of the jury?

II. Did the prosecutor commit error in the course of his examination of certain defense witnesses?

III. Did evidence which, even if introduced, would have been useful only for impeachment require the District Court to grant a new trial?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 24,714 and 71-1576

UNITED STATES OF AMERICA, *Appellee,*

v.

JIMMY R. JOHNSON, *Appellant.*

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By a two-count indictment filed November 24, 1969, appellant was charged with robbery and assault with a dangerous weapon, in violation of 22 D.C. Code §§ 2901 and 502, respectively. On June 17, 1970, appellant was tried by a jury before the Honorable Aubrey E. Robinson, Jr., and was found guilty as charged. On September 3, 1970, appellant was sentenced to serve concurrent terms of eighteen months to five years and one to three years. This appeal No. 24,714 followed. A second appeal (No. 71-1576), taken from the denial of a motion for new trial, was consolidated with the first on August 10, 1971.

The Offense

Harry S. Rideout, the assistant manager of McDonald's Restaurant at 4801 Deane Avenue, Northeast, closed the establishment at midnight on August 20, 1969. After closing he supervised the cleaning of the place did his paperwork, and counted the money. As the last person to leave he locked the door before departing at about 1:30 a.m. on August 21. While he was driving home, Rideout's car was forced to halt somewhere near the intersection of Benning Road and Oklahome Avenue by another car. The driver of the other vehicle was masked. Two unmasked men, armed with rifles, emerged from the second car, forced Rideout into the rear seat and commandeered his car. They drove him back to McDonald's, compelled him to let them inside and then made him open the safe. One of the men put the money from the safe into a plastic cover for a calculating machine. Rideout was then taken to the basement and placed in a freezer while the intruders made their getaway. After waiting ten minutes or so, Rideout utilized the safety handle and emerged from his icy confinement. Having been summoned by an alarm device attached to the safe, the police were already at the back door to McDonald's, but the robbers had made good their escape (Tr. 7-43, 147-158).[1]

The Identification of Appellant as a Robber

Mr. Rideout furnished the police with descriptions of the two armed men who had entered his car and who had later accompanied him back inside McDonald's. One of them was short, about 5′4″ to 5′5″ in height, weighing about 140 pounds, and of stocky build. He had a light complexion and wore his hair short. The second was taller, about 5′11″ or 6′ in height, of dark complexion and weighing approxi-

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[1] Reference to the transcript of the trial, including the pretrial motion proceedings, will be designated "Tr.". References to the transcript of the voir dire examination will be designated "Voir Dire Tr." Reference to the transcript of the closing arguments at trial will be designated "Supp. Tr.," while references to the motion for new trial will be designated "Tr. II." References to the transcript of the hearing on appellant's motion for bond pending sentencing will be designated "Bond Tr."

mately 150 pounds. Mr. Rideout was unable to furnish a description of the third man, the masked driver of the robbers' car. (Tr. 159-160). Sometime during the robbery, however, Mr. Rideout recognized the taller of the two armed men as a customer of McDonald's. Although he had never been introduced to the man, Rideout had seen him purchase sandwiches on many occasions (Tr. 160-161).

On an afternoon about ten or twelve days after the robbery, Mr. Rideout was at the front counter in McDonald's when he saw a truck pull up. As the driver emerged, Rideout immediately recognized him as the taller of the two armed robbers. The man was wearing the same black cap and the same sunglasses which he had worn during the robbery. He was also attired in dark green work clothes with "Ginn's" written on the side. The man spoke briefly to someone outside of the store, then approached the entrance. Seeing Rideout staring at him, he paused before entering. Mr. Rideout had in the meantime informed some of his employees that the customer was one of the robbers. While the man made his purchase, one of the employees wrote down the license number of the truck and noted its markings. After the man departed, Rideout relayed the information to the police (Tr. 52, 164).

The next day Detective Klepfel of the Robbery Squad visited Rideout and showed him ten black and white photographs of young Negro males. Rideout identified the photo of appellant, naming him as the taller robber[2] and the same individual who had the day before made a purchase at McDonald's. On September 30, 1969, Rideout viewed a police lineup and identified one of the participants, appellant, as one of the robbers (Tr. 168-170).

After the lineup, Mr. Rideout was shown a group of color photographs depicting young Negro males in various modes of attire. He identified appellant's photograph; more specifically, he identified the black cap and sunglasses which appellant had worn during the holdup and which he

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[2] On the basis of this identification Detective Klepfel obtained a warrant for appellant's arrest (Tr. 228).

was wearing in the photograph (Tr. 56-57, 102-104, 171-173, 234-236).

The Trial

Prior to trial the court entertained appellant's motion to suppress the identification testimony of Mr. Rideout. Testimony by Rideout and Detective Klepfel described the robbery, the lighting conditions in McDonald's, the descriptions furnished to the police, Rideout's recognition of appellant as a McDonald's customer, appellant's post-holdup visit to the McDonald's, the subsequent photo identifications, and the lineup proceedings (Tr. 39-50, 52-57, 62-68, 74-82, 89-99, 104-107). At the close of such testimony, the court denied the motion and found an independent basis for Mr. Rideout's identification of appellant. The court also ruled that the government could introduce testimony about the photographic and lineup identifications of appellant. (Tr. 120-123).

At a bench conference during the voir dire, appellant's trial counsel [3] indicated that he had several people whom he might call as witnesses but said, "I believe I don't have to identify them at this time, Your Honor" (Voir Dire Tr. 7). The court, however, noted the necessity for an impartial jury and instructed appellant's trial counsel as follows:

> Indicate to the jury you may call some or all of the following witnesses. If they are here, have them identified in person; if they are not here, by name and address. (Voir Dire Tr. 10.)

Counsel indicated that he knew all of the names, but that there were one or two addresses of which he was uncertain. He thereupon named for the jury panel all of the potential defense witnesses, giving those addresses which he knew (Voir Dire Tr. 11). No objection was made thereafter by appellant's trial counsel to such procedure.

Mr. Rideout recounted in detail for the jury how the

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[3] He is not counsel on appeal.

robbery had occurred, and how he had seen appellant in his establishment after the crime. He recalled his photograph and lineup identifications of appellant (Tr. 147-177). He identified appellant in court as one of the robbers (Tr. 151-152).

Detective Kelpfel told of the initial descriptions of the robbers furnished by Mr. Rideout. He recounted that he has initially shown Rideout several photographs of possible suspects but that Rideout had made no identification, and that appellant's photograph was not among such photos. He recalled receiving further information from Rideout, and how a check of the license tag and of the truck led him to appellant. Klepfel told the jury how he had then obtained a photo of appellant, and how Rideout had identified that photo from among nine others in a group. He described the lineup identification of appellant, as well as Rideout's later identification of appellant's hat and sunglasses from a group of color photographs (Tr. 220-236).

Appellant denied that he had played any role in the robbery. He told the jury that after leaving work on August 20, he had gone home, washed his car and had then met his friend, William Reginald ("Reggie") Johnson. He said that he and Reggie had visited some girls they knew and then departed for Reggie's home. Appellant claimed that he arrived there at about 10:00 or 10:30 p.m. and had played whist with Reggie's father and some friends until about 1:30 or 2:00 a.m., at which time he went to bed at Reggie's. He said that he never left the Johnson household that evening and arose at about 8:00 o'clock the next morning (Tr. 260-269). He also said that he had begun growing some "fuzz" sometime in June and was not clean-shaven in August (Tr. 299-300).

Elsie Johnson, Reggie's sister, remembered coming home from a party between 11:30 and 12:00 on August 20 and finding appellant and her brother playing cards. She said that appellant and Reggie had gone to bed between 1:30 and 2:00 a.m., and that she awoke them at about 5:30 in the morning (Tr. 315-325). Audrey Quick, Reggie's sister,

remembered that her brother and appellant had retired at about 1:00 a.m., but she stated that *she* had awakened appellant sometime after 6:30 a.m., that it was, in fact, about 7:00 a.m. She remembered that her sister Elsie at that time was still asleep (Tr. 351-357, 361-363). Charles E. Mont, Jr., a police officer and an acquaintance of appellant, was also present in the premises where appellant was playing cards on the evening of August 20 and morning of August 21. The last time that he remembered seeing appellant was approximately 3:00 a.m. (Tr. 413-416, 427-428). Other alibi witnesses also testified that appellant had been inside the Johnson home during the early morning hours of August 21.[4]

In effort to discredit the testimony of Mr. Rideout, appellant called Richard Brown, who identified himself as a former Captain of the Guards at Citywide Detective Agency he said that as in that position he was a special policeman authorized to carry a gun (Tr. 429-430). Mr. Brown stated that as a Citywide employee he was familiar with the Deane Avenue McDonald's and had actually helped to guard that establishment. He testified that the usual closing procedure for the night manager entailed depositing the cash receipts in the bank (Tr. 430-437). He also explained that the rear door to McDonald's had two locks, and the assistant manager had a key to only one of them (Tr. 437-438). Moreover, he explained that the lights in McDonald's parking lot would have been turned off (Tr. 440). Mr. Brown admitted, however, that he had last been assigned to the Deane Avenue McDonald's in April 1969 and that he had left his Citywide job in June 1969 (Tr. 434-436).

On cross-examination he explained that he left his employ with the detective agency only because it was discontinuing the guard service (Tr. 440-441). He also stated that he had met appellant, and that he knew Reggie Johnson, prior to the robbery. He further admitted that City-

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[4] They included Sidney Johnson, the father of Reggie, Reggie himself, Odella Solomon and Evelyn Champion.

wide at one time had a contract to guard Ginn's, the place where appellant was employed (Tr. 434-442). Brown was asked if there had been any trouble at McDonald's during the period he was guarding it (Tr. 443-444). He was asked if he owned an M-1 carbine (Tr. 444). He was also asked if he could have been driving down Benning Road in the vicinity of Oklahoma Avenue with a handkerchief over his face on the night of August 20 (Tr. 446-447). Each inquiry elicited a denial by Brown; appellant's trial counsel interposed no objection to such questions.

As a rebuttal witness, the Government called Mr. Thomas R. Mills, the director and president of Citywide Detective Agency. Mills stated that although Brown had been employed by Citywide on several occasions, totaling about eleven months, he had never been employed as a Captain of the Guards. Mills stated that Brown had at no time been a commissioned special policeman and was never authorized to carry a pistol. He recalled that Brown's first termination of employment occurred after some carpet had disappeared from a Ginn's warehouse which Mr. Brown had visited. The second termination of employment occurred after an automobile accident (Tr. 452-457).

After deliberation, the jury found appellant guilty as charged (Tr. 468).

The Motion for New Trial

On June 24, 1970, appellant filed a motion for new trial. The motion was based upon allegations that Mr. Thomas Mills, the government's rebuttal witness, had made certain statements immediately after leaving the courtroom to Richard Brown, a defense witness, in which Mills indicated that he had lied on the stand to protect the license of his company, the Citywide Detective Agency (see the affidavits of Richard Brown and Elsie Johnson appended to the motion for new trial). Appellant contended that the allegations constituted newly discovered evidence entitling him to a new trial.

The matter came on for a hearing on June 22, 1971, and testimony was taken from Mr. Brown, Miss Johnson, and

Mr. Mills. At the close of the hearing, the court ruled that Mills had not been a material witness, and that there was no reason to believe that even if the allegations were in fact true, the results of the trial would have been altered. The motion was denied (Tr. II 48).

ARGUMENT

I. In order to empanel an impartial jury it was essential that appellant identify prospective defense witnesses during the voir dire.

(Voir Dire Tr. 7-11; Tr. 374-382, 464)

Appellant objects to the voir dire proceedings, requesting this Court to reverse his conviction because the trial court required prospective defense witnesses to be identified to the jury panel and to the prosecutor. Specifically, he characterizes the proceedings during voir dire as follows:

> During voir dire of the jury panel, in the presence of the prosecutor, and before commencement of the trial, the District Judge required appellant to disclose the names of his witnesses, over strong objection of his counsel. (Supp. Brief for Appellant at 1.)

He now protests that such action gave the government unwarranted discovery of his case, before jeopardy had attached, in violation of Rule 16, FED. R. CRIM. P., and prejudiced his case by allowing the prosecutor to obtain impeachment evidence. We find this argument to be patently frivolous.

We initially disagree with appellant's statement that his trial counsel voiced "strong" objection to the court's ruling that he identify potential defense witnesses. It is true that appellant's counsel did not initially wish to identify such witnesses. When instructed to do so in the interests of empaneling an impartial jury, however, he voiced no objection (Voir Dire Tr. 10). Moreover, it takes only a cursory reading of the record to ascertain the reason behind any hesitancy which counsel then may have had about disclosing who his witnesses were to be. It is evident

that appellant's trial counsel was not sure about which, if any, of those witnesses he might call, and he did not want to at that juncture reveal any of his possible trial tactics to the jurors (see Voir Dire Tr. 7-9).[5] "Discovery" was certainly not one of the concerns of trial counsel.

We find the ruling of the court in this regard to be eminently sound, and certainly a valid exercise of its discretion. The trial court was concerned only about selecting an impartial jury; its comments reveal:

> Our only concern is that we have an impartial jury, and there has to be some preliminary investigation as to the impartiality of the jury, doesn't there[?]
>
> * * * * *
>
> So if they should know your principal witness, if you decide to call a witness and half the jury knew him, you take the position that that is nobody's business? (Voir Dire Tr. 9.)

Certainly no precise criteria exist for the manner in which a voir dire is to be conducted or the questions which properly may be propounded. The obvious goal, however, is to produce an impartial jury:

> Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula. *United States* v. *Wood,* 299 U.S. 123, 145-146 (1936).

Since no established litany prescribes the methods to be used, the trial court necessarily possesses a broad discretion in determining what means are to be employed in attempting to achieve the desired objectivity. The excercise of that discretion is, of course, governed by fundamental concepts of fairness. *Brown* v. *United States,* 119 U.S. App. D.C. 203, 338 F.2d 543 (1964). It is certainly essential and

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[5] Appellant's counsel noted, "[T]his has developed yesterday and last night" (Voir Dire Tr. 10).

fair that *both* the defense and prosecution identify prospective witnesses for the jury panel in order to ascertain whether any of the panel members know *any* of the witnesses or have had any prior contact with any of them.

Appellant's position that no inquiry should be made of the jury panel as to whether or not they know any of the defense witnesses before the witnesses are actually called to testify is untenable. The procedure used in this case, that is, stating to the panel members that "any or all of the following persons *may be called*," [6] affords a defendant adequate protection against any unfavorable inferences which might accrue from a mid-trial shift in defense tactics regarding which witnesses to call. In any event, the trial court's ruling in this regard was certainly within its discretion.

Nor can it be seriously argued that the government achieved prejudicial pretrial discovery of appellant's defense in violation of Rule 16. Even assuming *arguendo* that discovery was one of the prosecutor's motivations, it would indeed be no small inequality to force the government to reveal all of its witnesses, and at the same time allow the defense quietly to map its strategy. Aside from the inequities of appellant's novel proposal, it certainly cannot be said that he was prejudiced because the government was able to produce impeachment evidence against two of his witnesses (See Supp. Brief for Appellant at 1-6).[7] While it is certainly true that the advance notice gave the prosecutor additional time to secure such information, it cannot be argued that without such warning the impeachment evidence would not have been found. Nor is it fair to obscure the jury's search for truth by hide-and-seek tactics. We think that the pursuit of justice demands more, and that the quest is at the very least a

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[6] Voir Dire Tr. 11 (emphasis added).

[7] Appellant is in error when he suggests that the government was able to impeach William Reginald Johnson with prior convictions as a result of the voir dire disclosure of his identity—Johnson was never impeached with prior convictions (see Tr. 374-382). Indeed, his criminal past was not ascertained until after he had left the stand (Tr. 464).

venture involving *both* the prosecution and the defense. If the revelation of the names of defense witnesses is in this case even remotely considered as discovery, it certainly occurred *at trial,* was mutual, and certainly in no way abridged any rights of appellant. We think it is clear, however, that the court was seeking to guarantee an impartial jury and that the manner in which that goal was here pursued was entirely proper. Viewed even on appellant's terms, the court's action was an exercise of discretion which there has been no clear showing of abuse. *Silverthorne* v. *United States,* 400 F.2d 627, 638 (9th Cir. 1968).

II. Appellant was afforded a fair and impartial trial.

(Tr. 265, 299, 302-304, 322, 325-354, 357, 396-399, 405-407, 421-428, 430-447; Bond Tr. 11-13)

Appellant now argues that his conviction in this allegedly "paper thin" case was achieved by the prejudicial actions of an overzealous prosecutor. In so characterizing the government's case appellant conveniently ignores the gaping holes in his alibi. We think that the jury was not unmoved by the contrasts between the testimony adduced from appellant's various witnesses. Appellant, for example, claimed that he after playing cards until approximately 1:00 a.m., he arose at about 8:00 a.m. to leave for work (Tr. 265). Elsie Johnson stated [8] that *she* awakened appellant at about 5:30 a.m. (Tr. 322), although her sister Audrey Quick also claimed [9] to have performed that task at 6:30-6:45 a.m. (Tr. 357). Audrey vividly remembered that her sister Elsie had played cards; Elsie had earlier told the jury that she had not been playing, but had been merely observing the game (Tr. 325-354). Appellant testified that he and Reggie retired for the night sometime between 1:30 and 2:00 a.m. (Tr. 299, 302-304), whereas Charles E. Mont, Jr., another witness, remembered seeing appellant up and around at 3:00 a.m. (Tr. 427-428). Moreover, Mont, a member of the Metropolitan Police, told the

[8] On direct examination.

[9] Also on direct examination.

jury that he had made no effort to inform the government about his exculpatory testimony, but he also admitted that he had earlier told Detective Klepfel that on "a couple" of occasions he had attempted to contact the United States Attorney's office about it. He explained to the jury that the reason he had lied to the Detective Klepfel was that he did not realize that Klepfel was a police officer (Tr. 421-426).

The testimony of Richard Brown was likewise suspect. He claimed to have intimate knowledge of the procedures at the Deane Avenue McDonald's, including the fact that the assistant manager had the key to only one of the locks on the back door and therefore could not have let the robbers in at that entrance. On direct examination he testified that the lights in McDonald's parking lot would have been turned off. On cross-examination, however, he admitted that he really knew nothing about the condition of the lights or the locks on August 20 (Tr. 437-440, 444-445). Moreover, on cross-examination he acknowledged for the first time that he was acquainted with appellant, with Elsie Johnson and with her brother Reggie (Tr. 441-442).[10]

While each of these inconsistencies is by itself of little consequence, considered *in toto* they reflect a less-than-credible alibi defense. Moreover, we deal now with a cold record. The true nature of appellant's case was characterized by the trial court during the hearing on appellant's motion to set bond pending sentencing:

> The testimony that was heard and what could be inferred from the jury verdict is as follows: that he [appellant] had a responsible position and that he very deliberately, in cahoots with his buddy Reggie [*sic*] and with the employee of the agency, set up the robbery. There was every indication it was an inside job, and it was the Court's very distinct impression that the jury might well have concluded from the testimony that was presented in Court that it was

[10] We do not at this juncture explore the other inconsistencies in Brown's testimony revealed by the government's rebuttal evidence.

Richard Brown who drove the automobile up there with a mask on his face, and that it was Jimmy Johnson and Reggie that were the other two people involved in this, because it has all the earmarks, indication, of just that kind of a situation.

And, interestingly enough, there wasn't any question about the card game being played, and the very nature of the robbery could well have led the jury to conclude, as I think *the Court is entitled to conclude from the evidence that was heard,* that being present at that card game and having the officer there was all a deliberate plan, and the crucial period was not what happened at 10:00, 11:00, 12:00, 12:30 or 1:30—that's not what is crucial.

What was crucial was what happened after 1:30. It's the Court's distinct recollection that there might well have been a conflict in the testimony presented by the defendant that determined that matter, because the police officer was unequivocal about what was going on at three o'clock in the morning. He was in the apartment. His testimony was that the defendant was sitting there playing cards, and all of the other alibi witnesses talked about [how] they didn't see him after 1:30 because they "went to bed", and the next time they saw him was [*sic*] the two sisters, both of whom said they woke him up, so that he could go to work.

The jury might well have believed—I have no way of knowing what their rationale was—but in terms of the evidence that was presented, they might well have believed they played cards all night with all of those people in that apartment, played up until the time it was time to be picked up by Brown, and they scooted out of there and did what they had to do and came on back and finished playing cards and went to bed, and then the next day went on to work. There is nothing in the evidence to preclude that, not a thing to preclude it. (Bond Tr. 11-13) (emphasis added).

Against such a background appellant now suggests that the prosecutor committed error on numerous occasions.

Only now does he object to the prosecutor's having asked Brown if he owned or had ever owned a M-1 carbine (Tr. 444). Only now does appellant object to the prosecutor's questioning Brown about "trouble" at McDonald's during the time Brown had claimed to be a guard at that establishment (Tr. 443-444).[11] Only now does appellant object to the prosecutor's having asked Brown if he could have been driving down Benning Road on the morning of the offense wearing a handkerchief over his face (Tr. 446-447).

We stress, first of all, the fact that appellant's trial counsel did not object when the questions were posed. Such failure should now preclude appellant from challenging the propriety of these questions. While appellant now suggests that they were designed to impute complicity in the robbery to Brown, we think, as apparently did the trial court, that such questions were explorations of conclusions already apparent from Brown's testimony. We note that these inquiries were made only *after* it had been discovered that Brown had a prior acquaintance with appellant, that he had at one time had been employed in some capacity at Ginn's, the very place where appellant and Reggie Johnson worked, and that he was also a friend of Reggie and Elsie Johnson (Tr. 441-447).

Appellant's argument that the prosecutor deliberately misquoted the testimony of Evelyn Champion is also without substance. The colloquy between the witness and the prosecutor was as follows:

> Q. Just a minute. You said Mr. Johnson remembered that he got paid.
>
> A. That was on a Wednesday. We were trying to get the birthday party, and that was the reason I know it was the 20th, getting prepared for the birthday party.
>
> Q. You say that is the reason why "we know it was the 20th"?

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[11] Significantly, it was Brown himself who first mentioned the fact that there had been "a lot of trouble" at the Deane Avenue McDonald's (Tr. 443). The prosecutor's questioning was but an exploration of Brown's own comment.

A. The reason why I know, the reason why I know it was the 20th.

Q. Didn't you use the word "we"?

A. Yes, I did.

Q. Who else are you referring to?

A. Who else was I referring to?

Q. I am asking you, ma'am. Who is the "we" that you are referring to?

A. Well, I made a mistake. I said I meant myself. (Tr. 405-406.)

While it is evident, with the luxury of studied analysis of the record, that the prosecutor himself made a mistake, it necessarily follows that his questioning was not intentionally misleading. Indeed, the confusion is understandable in view of the witness' juxtaposition of the two pronouns. What the prosecutor was attempting show was that Miss Champion had discussed this matter with others, a fact which she later admitted (Tr. 406-407). While the misunderstanding of a witness' answer is of course unfortunate, no amount of appellate scrutiny can magnify this to anything more than a minor matter, which the witness herself defused when she said that if she used the word "we," she was mistaken.

Appellant's suggestion that the prosecutor "argued with the witness [*sic*] unnerving them and affecting their testimony" is likewise a gratuitous magnification of a minor incident (Tr. 396-399). It is of no small significance that appellant at this juncture finds only a single instance to which to object. We note once again that appellant's trial counsel raised no objection to the prosecutor's questioning.

Nor is there any merit in appellant's argument that the prosecutor erroneously impeached the testimony of Richard Brown. Brown testified that a Captain of the Guards for Citywide Detective Agency, he had intimate knowledge about the layout and procedures at the Deane Avenue McDonald's (Tr. 430-440). It was certainly permissible for the prosecutor to inquire about his duties and about the reasons for his job change. Once the witness had testified with particularity about such things, the fact that his former

employer had different recollections about duty assignments and the reasons for the termination of his employment was certainly something which the jury could consider in weighing the credibility of Mr. Brown. While exploration of such areas of dispute was to some extent collateral to the offense with which appellant was charged, it was most germane to the honesty of Mr. Brown, a witness called by appellant. We again note that appellant's trial counsel did not see fit to object to such inquiries. We submit that in allowing such questioning of Mr. Brown, and in allowing the prosecutor to develop evidence rebutting his testimony, the court was exercising its discretion in a sound and fair manner.

A close reading of the record in this case demonstrates that appellant's attack upon the prosecutor is without merit. A criminal trial, as this Court has stated, "is not a minuet." *Taylor* v. *United States,* 134 U.S. App. D.C. 188, 189, 413 F.2d 1095, 1096 (1969). It is a hard-fought contest in which the government is not limited to a kid-glove approach but may strike hard and vigorous, but not foul, blows. *See Berger* v. *United States,* 295 U.S. 78, 88 (1935). We submit that the prosecutor in this case fully measured up to the "standards which a Government counsel should meet to uphold the dignity of the Government." *Taylor* v. *United States, supra,* 134 U.S. App. D.C. at 189, 413 F.2d at 1096.

III. The trial court properly denied appellant's motion for new trial.

(Tr. 436-437; Hearing Tr. 24, 27, 35, 39-45)

Appellant argues that the court erred in denying his motion for new trial based upon newly discovered evidence. Putting aside for the moment the legal issues involved in appellant's claim, we submit that appellant proceeds from the tenuous premise that his charges of dissembling were proved. Only a cursory comparison of the affidavit of Mr. Brown and his testimony during the hearing is required to show that appellant did not establish that there was

in fact *any* newly discovered evidence regarding any of Mr. Mills' testimony. In his affidavit Brown specifically recalled that after Mills had testified, Brown asked him "why he had *lied* about me, and he responded that his license was at stake" (emphasis added). During the hearing, however, Brown with equal specificity stated:

> I did not say to him, "Why did you lie. Why did you lie in court?" I said, "Why did you say what you said?" And he said that "My license is at stake. I am not going to lose my license." This is all the man said. No more conversation. I left and sat down. (Hearing Tr. 24.)

Later Brown admitted that the word "lie" used in the affidavit was inaccurate (Hearing Tr. 27). Miss Johnson, however, specifically recalled that Brown had used the word "lie" in his conversation with Mills (Hearing Tr. 35). We think that there was more than a small degree of doubt whether appellant actually demonstrated that Mills had in fact stated he would have testified differently had he not been concerned about his license.[12] Mr. Mills denied making the statement to Brown (Hearing Tr. 39-45).

Even assuming, however, that the hearing on appellant's motion elicited evidence matching appellant's claims, it does not follow that the court erred in denying his motion. Rule 33 of the Federal Rules of Criminal Procedure provides that "the court on motion of a defendant may grant a new trial to him if required in the interest of justice." It is well settled that the granting of a motion for new trial based on newly discovered evidence rests within the sound discretion of the trial court. *United States* v. *Johnson,* 327 U.S. 106 (1946); *United States* v. *Gaither,* 142 U.S. App. D.C. 234, 440 F.2d 262 (1971); *Blackburn* v. *United States,* 97 U.S. App. D.C. 62, 228 F.2d 111 (1955); *Thompson* v.

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[12] The record is curiously silent concerning the time at which appellant's counsel was first informed about the alleged conversation. Supposedly the remarks were made by Mr. Mills during the luncheon recess on June 16, and prior to the renewal of defense motions before final argument. If appellant's counsel had received information about the conversation prior to his summation, he could have requested leave to reopen his case in order to explore the matter.

United States, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951); *United States* v. *Luxenberg,* 374 F.2d 241 (6th Cir. 1958); *United States* v. *Costello,* 255 F.2d 876 (2d Cir. 1958); *Wolcher* v. *United States,* 233 F.2d 748 (9th Cir. 1956). An appellate court had authority to review the denial of a motion for new trial only for an abuse of discretion. Being mindful of the exceptional vantage point of the trial judge, who also heard and denied the motion for new trial, to evaluate evidence and its probable effects, *Jeffries* v. *United States,* 215 F.2d 225 (9th Cir. 1954), appellate courts should not intervene unless it clearly appears that the trial court's denial of the motion is not supported by the evidence. *United States* v. *Johnson, supra.*

Even assuming that Mr. Mills made the statements to Brown which appellant claims, such evidence is not of the nature which requires a new trial. At most, it is merely impeachment evidence which if used might discredit the credibility of the government's *rebuttal witness.* The rebuttal witness had been called for the limited purpose of impeaching *one* of appellant's witnesses. Moreover, that witness was not one of the alibi witnesses, and his testimony was of questionable benefit to appellant even on direct examination (see Tr. 436-437).

A careful consideration of the evidence which appellant seeks to elicit in a new trial reveals that it is only of an impeaching nature. It is immaterial to the charges for which appellant was convicted, and even if allowed, it would not likely have produced an acquittal at a new trial. Accordingly, appellant's motion was properly denied. *Thompson* v. *United States, supra; Lindsey* v. *United States,* 368 F.2d 633 (9th Cir. 1966), *cert. denied,* 386 U.S. 1025 (1967); *Pitts* v. *United States,* 263 F.2d 808 (9th Cir.), *cert. denied,* 360 U.S. 919 (1959); *United States* v. *Luxenberg, supra.* That decision of the District Court should not be disturbed upon the flimsy and speculative claims made here by appellant.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

HAROLD H. TITUS, JR.,
United States Attorney.

JOHN A. TERRY,
BROUGHTON M. EARNEST,
C. MADISON BREWER,
Assistant United States Attorneys.

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